

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NARCISO A. FRANCO,)	
)	
Petitioner,)	CRIMINAL NO: 01-10333
)	
vs.)	
)	
UNITED STATES OF AMERICA,)	THE HONORABLE JUDGE
)	MORRIS E. LASKER
Respondent.)	
)	

MEMORANDUM ON MOTION TO VACATE, SET ASIDE,
OR CORRECT SENTENCE PURSUANT TO 8 U.S.C. § 2255

Now comes, the Petitioner, Narciso Franco, appearing through himself Pro-Se, who respectfully moves this Honorable Court to vacate, set aside, or correct the sentence imposed in the above captioned case, pursuant to 28 U.S.C. § 2255 and for the reasons presented infra.

PLEA FOR LIBERAL CONSIDERATIONS

Narciso Franco, Petitioner ("Petitioner") respectfully moves this Honorable Court to grant all liberal considerations with respect to this action, pursuant to Haines v. Kerner, 404 U.S. 519 (1972), as Petitioner is not an attorney, has not attended law school, and has had no professional training with respect to the filing of legal pleadings.

ISSUES PRESENTED

1. Franco's trial counsel was overall ineffective.
 - I. Franco's attorney was ineffective for failure to request an evidentiary hearing on the 'safety valve' issue.
 - II. Franco's attorney was ineffective for failure to argue a downward departure for the Petitioner's 'extra ordinary family circumstances.'
2. The Court failed to convene sua sponte on an evidentiary hearing on the 'safety valve' issue.
3. The wide disparity in the sentencing between Franco and his co-defendant raised a presumption of vindictiveness by the prosecutorial officials.

MEMORANDUM OF POINTS AND AUTHORITIES
BRIEF INTRODUCTION - PROCEDURAL HISTORY

On July 25, 2002, the Petitioner Narciso Franco ("Franco") pleaded guilty to a plea agreement to a Two Count Indictment. Namely, Count 1, conspired to possess with the intent to distribute 500 grams of cocaine, in violation of 21 U.S.C. § 846. And Count Two, to distribute cocaine in violation of 21 U.S.C. § 841(a). (See attachment, indictment, Exhibit 1).

At the Rule 11 hearing on July 25, 2005, Franco stipulated with the government that the drugs amount was between 500 grams - 2000 grams of cocaine. Also, he agreed that he was to be assessed a two point obstruction of justice upward for his failure to appear in court for his original scheduled Rule 11 hearing. However, he reserved the right to request acceptance of responsibility. (See attachment, plea agreement, Exhibit 2).

On December 4, 2002, the District Court sentenced Franco to 78 months in prison on each Count to be served concurrently, and four years of supervised release.

STATEMENT OF FACTS

As backround on the case, the following facts occured. Which led up to the Two Counts indictment.

On July 12, 2001, Franco and a co-defendant, Martin Pena ("Pena") among others were arrested. The arrest came as a result of the cooperation of a Omay Ford (who was a cooperating witness for the government). Omay Ford ("Ford") told the government Franco and Pena were his primary source of supply of powdered cocaine.

Ford initiated a planned drugs transaction with Franco and Pena. On the morning Franco and Pena were arrested, a series of calls were made among the defend-ants and Ford about the intended drug purchase. When Franco and Pena arrived to pick up the drugs, they were arrested. Pena had four ounces of powder cocaine hidden in his front pocket and the rear passenger seat of the car in which they arrived contained nine ounces of powder cocaine hidden in a tee-shirt.

On January 11, 2002, Franco notified his attorney that he intended to offer a change of plea.

On February 28, 2002, a Rule 11 plea hearing was scheduled. However, Franco who was on home confinement bond and an electric monitoring device failed to appear.

On May 17, 2002, Franco was arrested and detained. Thereafter, Franco pro-ceeded with his intention to plead guilty to the charges.

On July 25, 2002, Franco entered into a plea agreement with the government. He pleaded guilty to the two counts indictment. Franco also agreed for the plead to be assessed a two points upward departure for obstruction of justice. However, Franco maintained his right to receive a 3 points downward departure for acceptance of responsibility. The Plea Agreement did not mention a recommendation for a safety valve protection.¹

A Presentence Report ("PSR") was prepared by the Probation Office and submitted to the government. (See attachment, Exhibit 3). The PSR did not recommend a downward departure for acceptance of responsibility. However, the Probation Office found him eligible for the 'safety valve' protection by placing him in Category 1. Additionally, the Probation Office noted Franco was qualified for the Safety Valve under criteria 1-4, but left open whether Franco would qualify for the safety valve criterion 5.

On December 2, 2002, Franco submitted his proffer. On December 3, 2002, the government submitted its sentencing memorandum, without attaching the investigation form for Franco's proffer.

On December 11, 2002, Franco was sentenced by the Court to 78 months, at level 28, Category 1. The Court did not grant a downward departure of 3 levels for acceptance of responsibility nor did the Court apply a two (2) level downward departure for the Safety Valve. Finally, the Court did not convene on an evidentiary hearing on the 'safety valve' issue.

¹ Franco is a first time offender.

On the other hand, Franco's co-defendant Javier Santiago-Fiel ("Pena") was sentenced on July 25, 2002 to one year and one day in prison. (See, PSR, Exhibit 4). Additionally, Pena was given a 3 level downward departure for acceptance of responsibility and a 2 level downward departure for safety valve protection.

ARGUMENTS

1

PETITIONER'S COUNSEL WAS OVERALL INEFFECTIVE

In Strickland v. Washington, 466 U.S. 668, the United States Supreme Court announced a two prong test which should be satisfied by defendants claiming ineffective counsel. The defendant must show both:

- (1) Counsel's representation fell below an objective standard of reasonableness; and
- (2) There exists a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different.

The Strickland prongs were established in the present case, when the Franco's counsel failed to make arguments to the Court about Franco's 'extra ordinary family circumstances, he failed to request an evidentiary hearing on the 'safety valve' issue among other evidence that Franco's attorney failed to present or made arguments to the Court.

A defendant's Sixth Amendment right to effective assistance of counsel extends to sentencing. See, Mempa v. Rhey, 389 U.S. 128, 19 L.Ed.2d 336, 88 S.Ct. 254 (1962). Franco's Sixth Amendment rights were violated when his counsel failed to make certain arguments to the Court about Franco's extra ordinary family circumstances at the sentencing.

As a result of the unprofessional errors made by the trial attorney, the Petitioner was duly prejudiced in his sentencing. Therefore, this Honorable Court should grant a correction or reduction in the Petitioner's sentence.

I. Franco's attorney was ineffective for failure to request an evidentiary hearing on the 'safety valve' issue.

Congress enacted the safety valve provision, 18 U.S.C. § 3553(f), in order to mitigate the harsh effect of mandatory minimum sentences supporting roles in drug-trafficking schemes. See, United States v. Miranda-Santiago, 96 F.3d 517, 527 (1st Cir. 1996) at n. 22 (citing H.R. Rep. No. 103-460 2d Sess., at & (1994).

In the present case, Franco's trial attorney did not request an evidentiary hearing before sentencing. Further, the attorney made no effort to show that an evidentiary hearing would have been useful. Indeed, an evidentiary hearing would have been useful by the Court to sift through evidence and thereby timely determined whether Franco should have been given the cover of the 'safety valve'.

In U.S. v. Ortiz-Santiago, 211 F.3d 146, 150 (1st Cir. 2000), the court announced that the safety valve applies if:

- (1) The defendant did not have more than 1 criminal history point;
- (2) The defendant did not use violence or credible threats of violence or possess a firearm or dangerous weapon...;
- (3) The offense did not result in death or serious bodily injury to any person;

(4) The defendant was not an organizer, leader, manager or supervisor of others in the offense...; and

(5) Not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense...

In the present case, the PSR reflected that Franco has met prongs, 1 thru 4, but the Probation Office left the fifth prong of the safety valve to be determined by the Court. Franco divulged all information he knew concerning the drugs offense; however, the attorney did not request an evidentiary hearing after the government offered a different view. Indeed, Franco met all the criteria of the safety valve; he has no prior criminal record; he did not carry a firearm; threaten violence, engage in an activity that was shown to involve death or serious bodily harm to others; and he has been forthcoming with the authorities.

Franco's attorney failed to request an evidentiary hearing when the government stated he did not divulge all he knew about the offense. As a result of this unprofessional error by the attorney Franco suffered the consequence of a lengthened sentence. The court in U.S. v. Dethlefs, 123 F.3d 39, 44-45 (1st Cir. 1997), stated that all the criteria for the safety valve are objective. See also 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2.

Therefore, Franco's trial attorney should have requested an evidentiary hearing to facilitate the Court to sift through the evidence. As a result of this unprofessional error on the part of Franco's attorney, this Honorable Court grant a reduction or correction in the Petitioner's sentence.

II. Franco's attorney was ineffective for his failure to argue a downward departure for the Petitioner's 'extra family circumstances'

Although the sentencing guidelines (U.S.S.G.) states that a defendant's family ties and responsibilities are "not ordinarily relevant in determining whether a sentence should be outside the applicable range," (5H1.6) under guideline 5K2.0 "the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds, "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. Moreover, the federal sentencing guidelines now stands as advisory to the courts. See, U.S. v. Booker, ___ U.S. ___, (2005 WL 50108 (U.S.)).

Further, the courts throughout the federal circuits have departed for "extreme family circumstances." For example, in United States v. Johnson, 964 F.2d 124 (2nd Cir.1992), the Court departed because the defendant was a single parent, with three infant children which solely depended on the defendant. In the present case, Franco is the exclusive provider for his infant son living in the Dominican Republic. Additionally, Franco is the sole provider for his elderly ill parents in the Dominican Republic. Moreover, Franco will be deported from the United States. Therefore, the interest of justice would not be served to further wreck havoc in an entire family's life by the continued lengthy sentence of the Petitioner.

The Petitioner urges this Honorable Court to consider these extra ordinary family circumstances, and correct/reduce the Petitioner's sentence so he could

sooner be sent back to his native country to take care of his family. The Petitioner's trial attorney failed to present evidence and/or make arguments to the Court in reference to the Petitioner's extra ordinary family circumstances, thereby, the Petitioner was duly prejudiced at his sentencing.

2 The Court failed to convene sua sponte on
 an evidentiary hearing on the 'safety valve' issue.

Pursuant to 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2, the District Court was obligated to afford Franco a 'safety valve' protection with a two point reduction, and impose a sentence without regard to any statutory minimum, if the Court found that Franco met the criteria of 18 U.S.C. § 3553(f) 1 - 5 and U.S.S.G. § 5C1.2.

In United States v. Reid, 139 F.3d 1367 (11th Cir. 1998), the court stated, "the district court must make sufficient findings in denying a safety valve protection to permit meaningful review. (Emphasis added). In the present case, the District Court did not make a sufficient finding. In fact, the Court rather performed a perfunctory respond to the government request for clarification as to the 'safety valve' issue. The following excerpt demonstrates what took place at the sentencing hearing:

MR. MATHEW: Yes, Your Honor, I just wanted to clarify the precise conviction that he's been sentenced on. And then also I just wanted to confirm that the sentence is based on...no reduction for the safety valve.

THE COURT: That's correct...

MR. McCALL: So essentially,...the Court is finding that he does not qualify for the safety valve?

THE COURT: Yes.

MR. McCALL: And I assume that's category five - I mean, criteria five in the proffer.

THE COURT: Yes. Yes.

(Sentencing Hearing at 15 - 16; Exhibit 5).

The colloquy exchanged that took place as mentioned supra did not resolve the gap that was left open by the PSR nor the Court's obligation to conduct sufficient findings. Instead, the Court made a bare statement without more.

Further, in United States v. Ortiz-Santiago, 211 F.3d 152, the Court stated, "When a defendant asserts entitlement to safety valve protection, the Court then must pass upon the matter, exercising its independent judgment and must sift through the statutory criteria and, if it determines that if one criteria has not been met, must elucidate specific reasons why the provision does not apply." (Emphasis added). In the present case, the Court did not sift through the evidence to make an independent determination on its own, rather the Court made some bare statements without a finding.

Furthermore, the Court in United States v. Bradstreet, 207 F.3d 76, 81 (1st

Cir. 2000) stated, "sentencing, after all, is a matter for the district court and not for the government." Therefore, the Honorable Court should pass upon the matter, exercising its independent judgment. See, also, Fed. R. Crim. P. 11(e)(1)(B).

In the present case, the Petitioner divulged all the information he knew about the offense to the government. However, the government at the sentencing said he did not divulged all the information he knew. On the other hand, neither did Franco's attorney request an evidentiary hearing nor the Court initiated a sufficient finding sua sponte, and as a result Franco was duly prejudiced. The Court in United States v. Matos, 328 F.3d 34 (1st Cir. 2003) stated, "the government is not free to play cat and mouse with defendants, leading safety valve debriefings down blind alleys and then blame the defendants for failing to disclose material facts. The sentencing Court has both the power and coign of vantage to permit it to deal effectively with such situations." Id. at 40.

In essence, in order for the Court to receive the deference to be afforded to its decision on the safety valve issue, the Court was obligated to make findings of fact and conclusions of law upon which review may be have been had. In this case, no findings on safety valve criteria 5 (five) were made. Additionally, no reference was made by the judge to the dispatated safety valve factual issues in the present case. See, United States v. Marquez, 280 F.3d 19, 26 (1st Cir. 2002).

In fact, the Court's only explanation with regard to its decision was that the Court felt it was obliged to impose the sentence rendered, although the Court regretted having to do it. (See, S.H., Exhibit 6). That was incorrect. The Court misunderstood its discretionary power in regards to the safety valve. This mistake by the Court unduly prejudiced Franco resulting into a longer sentence.

Therefore, this Honorable Court should grant a reduction or correction in Franco's sentence in light of the Court's failure to make a meaningful finding on the safety valve issue.

3 The wide disparity in the sentencing between Franco and his co-defendant raised a presumption of vindictiveness by the prosecutorial officials

A prosecutor's duty in a criminal prosecution is to seek justice, not vengeance. See, Berger v. United states, 295 U.S. 78, 88 (1935). In Brecht v. Abraham, 113 S.Ct. 1710 (1993), the Court stated "A habeas corpus relief for trial errors involving prosecutorial misconduct should be granted if the error had substantial and injurious effect on the defendant."

In the present case, on December 11, 2002, Franco was sentenced to 6 years and 6 months. While on the other hand, Pena, Franco's co-defendant (co-worker) in the drug transaction was sentenced on July 25, 2002 to one year and one day in prison. (See PSR at 3, Exhibit 4). Both defendants essentially played the same role in the drug activity. Both defendants were co-workers, co-conspirators and partners in the drug transaction. Additionally, both defendants were first time offenders. However, despite the relative comparable culpability played by the defendants, there was an extra ordinary sentencing disparity between them.

The prosecutor developed a vindictive sense of justice against Franco because on February 28, 2002, the Petitioner failed to appear for his Rule 11 Hearing. The Petitioner had jumped bail because of his fear of deportation and the fear of not seeing the birth of his child. Nevertheless, the Petitioner had expressed

remorse for his indiscretion and quickly informed the prosecutor of his intention to cooperate fully and to make a plea agreement with the government after he was apprehended by the authorities. Despite, these efforts made by Franco, the prosecutor had an axe to grind with him. The prosecutor began to act not in the interest of justice, but rather out of vengeance against Franco.

In United States v. Flanagan, 80 F.3d 143 (5th Cir. 1996), the Court held that a 500% disparity between co-conspirators are unacceptable given relative comparable culpability. In the present case, the disparity between Franco and his co-defendant was 650%. A line of cases out of the First Circuit have stated "it would be an affront to justice to create a disparity in sentence where disparity in conduct does not exist." See, also, United States v. Thurston, 358 F.3d 51 (1st Cir. 2004); citing United States v. Wogan, 938 F.2d 1446, 1448 (1st Cir. 1991). See, also, United States v. Romolo, 937 F.2d 20, 25 n.5 (1st Cir. 1991).

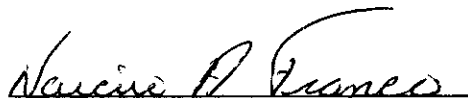
In the present case, the Petitioner was duly prejudiced by the extra ordinary sentence disparity between him and his co-defendant. The government did concur that the two defendants (Franco and Pena) were pointing fingers at each other and thereby cancelled each other out in their respective proffers to the government. (See S.H. page 8, Exhibit 7). However, the prosecutor allowed his personal intentional bias or animosity against Franco to be a factor into his determination as to who to believe and who to punish with a longer sentence. As a result of the prosecutor's vindictiveness led to a sweetheart deal with Pena (Franco's co-defendant) and a punitive blow to Franco. This arrangement resulted into a sentence of one year and one day for Pena and 6 years and 6 months for Franco.

The prosecutor's misconduct in the present case resulted into a substantial and injurious effect on the Petitioner. This would be abhorrent to the interest of justice if the Court allows it to stand. See, United States v. Ortiz-Santiago, 211 F.3d 146 (1st Cir. 2000).

4

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays this Honorable Court to exercise its discretion and correct or reduce the Petitioner's sentence under the discretionary sentencing guidelines. See, U.S. v. Booker, ___ U.S. ___, WL 50108 (U.S.); by thereby, taking into consideration the effect of the lengthy sentence will have on the Petitioner's family (especially his infant son in the Dominican Republic), who all exclusively depends upon the Petitioner. The ends of justice requires this Honorable Court to also consider a reduction in the Petitioner's sentence in light of his Sixth Amendment violations.




Narciso A. Franco
Reg. No. 23787-038
F.S.L. Elkton, Unit H/A
P.O. Box 10
Lisbon, Ohio 44432

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NARCISO A. FRANCO,)	
)	
Petitioner,)	CRIMINAL NO: 01-10333
)	
vs.)	
)	
UNITED STATES OF AMERICA,)	THE HONORABLE JUDGE
)	MORRIS E. LASKER
Respondent.)	
)	

VERIFICATION

Now comes, the Petitioner, Narciso A. Franco pursuant to the Federal Statute on Verification 28 U.S.C. § 1746 unsworn authorities states that the statements made in the Petitioner's motion § 2255 are true and correct.


Narciso A. Franco

CERTIFICATE OF SERVICE

I certify that on April 18, 2005, I mailed a complete copy of the Petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 and all attachments to all parties addressed as shown below:

1. Clerk's Office
United States District Court
District of Massachusetts
John Joseph Moakley Federal Courthouse
1 Courthouse Way
Boston, MA 02210

2. Brian J. Leske
Assistant U.S. Attorney
United States Attorney's Office
John Joseph Moakley Federal Courthouse
1 Courthouse Way, Suite 9200
Boston, MA 02210


Narciso A. Franco

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)

CRIMINAL NO. *01-10333-MEL*

v.)

VIOLATIONS:

JAVIER SANTIAGO-FIOL,)
a/k/a, Martin Pena,)

21 U.S.C. § 846 -

and)

Conspiracy to Possess with
Intent to Distribute, and to
Distribute, Cocaine

NARCISO FRANCO,)

Defendants.)

21 U.S.C. § 841(a)(1)
Possession of Cocaine with
Intent to Distribute

18 U.S.C. § 2 -

Aiding and Abetting

INDICTMENT

COUNT ONE: Title 21, United States Code, Section 846 -
Conspiracy to Possess with Intent to Distribute,
and to Distribute, Cocaine

The Grand Jury charges that:

Beginning on an unknown date but at least by in or about
March 2001, and continuing until on or about July 12, 2001, in
Boston, the District of Massachusetts,

JAVIER SANTIAGO-FIOL,
a/k/a "Martin Pena," and
NARCISO FRANCO,

defendants herein, knowingly and intentionally combined,
conspired and agreed with persons known and unknown to the Grand
Jury to possess with intent to distribute, and to distribute
cocaine, a Schedule II controlled substance, in violation of
Title 21, United States Code, Section 841(a)(1).

It is further alleged that the offense charged in this count involved 500 grams or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

All in violation of Title 21, United States Code, Section

846.

COUNT TWO: 21 U.S.C. § 841(a)(1) - Possession of Cocaine with
Intent to Distribute; 18 United States Code,
Section 2 - Aiding and Abetting

The Grand Jury further charges that:

~~9001~~
In or about July 12, 2000, in the District of Massachusetts,

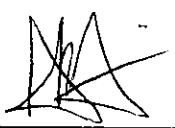
JAVIER SANTIAGO-FIOL,
a/k/a "Martin Pena," and
NARCISO FRANCO,

defendants herein, did knowingly and intentionally possess with
intent to distribute, and did distribute cocaine, a Schedule II
controlled substance.

All in violation of Title 21, United States Code, Section
841(a)(1) and Title 18, United States Code, Section 2.

A TRUE BILL

George Clattenburg
Asst FOREPERSON OF THE GRAND JURY



DICKENS MATHIEU
Assistant U.S. Attorney

DISTRICT OF MASSACHUSETTS; September 19, 2001. *at 2:30 pm*

Returned into the District Court by the Grand Jurors and
filed.

Aina Puccinino
DEPUTY CLERK

JS 45 (1/96) (Revised U.S.D.C. MA 8/27/96)

Criminal Case Cover Sheet

U.S. District Court - District of Massachusetts

Place of Offense _____ Category No. II Investigating Agency DEACity Boston, MA

Related Case Information:

County Suffolk

Superseding Indictment _____ Docket No. _____

Original Defendant _____ New Defendant XMagistrate Judge Case Number 01-0492-RBC

Search Warrant Case Number _____

R 20/ R 40 from District of _____

Defendant Information:

Defendant Name Narciso Franco Juvenile: _____ Yes X No

Alias Name _____

Address UnknownBirthdate 3/03/70 SS # 022-74-4766 Sex M Race H Nationality DominicanDefense Counsel if known: James McCallAddress: 4 Longfellow Place, Boston, MA 02114U.S. Attorney Information: Dickens Mathieu Phone No. 748-3227Address: One Courthouse Way, Federal Courthouse, Suite 9200, Boston, MA 02210Bar No. _____ Interpreter: ☐ No X YesList Language and/or dialect: Spanish Matter to be SEALED: X No ☐ Yes☐ Warrant Requested☐ Regular Process☐ In CustodyArrest Date 7/12/01☐ In Federal Custody as of _____ in _____☐ In State Custody at _____☐ Serving Sentence ☐ Awaiting Trial X On Pretrial ReleaseOffenses Charged: ☐ Complaint ☐ Information X IndictmentTotal # of Counts: ☐ Petty _____ ☐ Misdemeanor _____ ☐ Felony 2Date: September 19, 2001 Signature of AUSA: _____

Continue on Page 2 for Entry of U.S.C. Citations

(Revised U.S.D.C. MA 8/27/96) Page 2 of 2

District Court Case Number (To be filled in by deputy clerk): _____

Name of Defendant Narciso Franco

U.S.C. CITATIONS

	<u>U.S.C. Citations</u>	<u>Description of Offense Charged</u>	<u>Count Numbers</u>
Set 1	<u>21 USC § 846</u>	<u>Consp. to Poss. w/ Int. to Dist. Cocaine</u>	<u>1</u>
Set 1	<u>21 USC § 841(a)(1)</u>	<u>Poss. w/ Int. to Dist. Cocaine</u>	<u>2</u>

ADDITIONAL INFORMATION:

(crjs45rv.cov - 9/3/96)

JS 45 (1/96) (Revised U.S.D.C. MA 8/27/96)

Criminal Case Cover Sheet

U.S. District Court - District of Massachusetts

Place of Offense _____ Category No. II Investigating Agency DEACity Boston, MA

Related Case Information:

County Suffolk

Superseding Indictment _____ Docket No. _____

Original Defendant _____ New Defendant XMagistrate Judge Case Number 01-0492-RBC

Search Warrant Case Number _____

R 20/ R 40 from District of _____

Defendant Information:Defendant Name Javier Santiago-Fiol Juvenile: _____ Yes X NoAlias Name Martin PenaAddress UnknownBirthdate 1/31/77 SS # 581-49-3319 Sex M Race H Nationality DominicanDefense Counsel if known: William KeefeAddress: 55 Amory Street, Boston, MA 02130U.S. Attorney Information: Dickens Mathieu Phone No. 748-3227Address: One Courthouse Way, Federal Courthouse, Suite 9200, Boston, MA 02210Bar No. _____ Interpreter: ☐ No X YesList Language and/or dialect: Spanish Matter to be SEALED: X No ☐ Yes☐ Warrant Requested☐ Regular ProcessX In CustodyArrest Date 7/12/01X In Federal Custody as of 7/12/01 in Plymouth House of Corrections☐ In State Custody at _____☐ Serving Sentence☐ Awaiting Trial☐ On Pretrial Release

Offenses Charged:

☐ Complaint☐ InformationX Indictment

Total # of Counts:

☐ Petty _____☐ Misdemeanor _____☐ Felony 2Date: September 19, 2001 Signature of AUSA: _____

Continue on Page 2 for Entry of U.S.C. Citations

(Revised U.S.D.C. MA 8/27/96) Page 2 of 2

District Court Case Number (To be filled in by deputy clerk): _____

Name of Defendant Javier Santiago-Fiol, a/k/a Martin Pena

U.S.C. CITATIONS

	<u>U.S.C. Citations</u>	<u>Description of Offense Charged</u>	<u>Count Numbers</u>
Set 1	<u>21 USC § 846</u>	<u>Consp. to Poss. w/ Int. to Dist. Cocaine</u>	<u>1</u>
Set 1	<u>21 USC § 841(a)(1)</u>	<u>Poss. w/ Int. to Dist. Cocaine</u>	<u>2</u>

ADDITIONAL INFORMATION:

(crjs45rv.cov - 9/3/96)

Criminal Complaint

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

V.

JAVIER SANTIAGOFIOL and
NARCISO A. FRANCO

(Name and Address of Defendants)

CRIMINAL COMPLAINT

MAGISTRATE JUDGE NO:

2001 M 0492 RB

I, the undersigned complainant being duly sworn state the following is true and correct to the best of my knowledge and belief.

On or about December 20, 2000 through July 12, 2001, in Suffolk & Plymouth Counties, in the District of Massachusetts defendant(s) did, (Track Statutory Language of Offense)

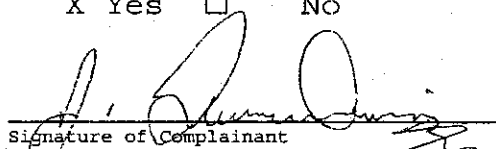
unlawfully, knowingly, and intentionally conspire to distribute, and possess with intent to distribute, cocaine and cocaine base, schedule II controlled substances,

in violation of Title 21 United States Code, Section(s) 846.

I further state that I am a(n) DEA Special Agent and that this complaint is based on the following facts:
Official Title

See Affidavit of DEA Special Agent Joseph Tamuleviz attached hereto and made a part hereof.

Continued on the attached sheet and made a part hereof: ☒ Yes ☐ No

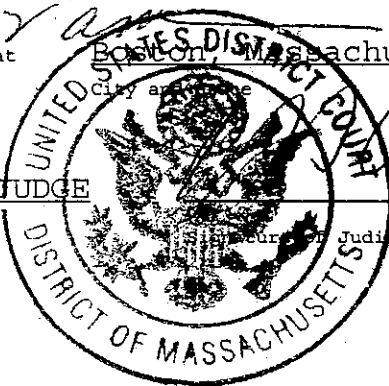

Signature of Complainant
Joseph Tamuleviz, Special Agent
Drug Enforcement Administration

Sworn to before me and subscribed in my presence,

July 13, 2001 at 11:47 am at Boston, Massachusetts
Date City and State

ROBERT B. COLLINGS
UNITED STATES MAGISTRATE JUDGE

Name and Title of Judicial Officer



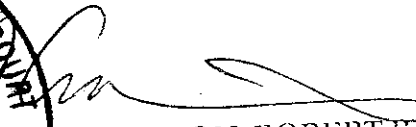

HON. ROBERT B. COLLINGS
CHIEF U.S. MAGISTRATE JUDGE
United States District Court
United States Courthouse, - Suite 6420
1 Courthouse Way
Boston, MA 02210

EXHIBIT 2

RECEIVED
U.S. PROBATION



2002 JUL 31 AM 8:30

BOSTON NEW CTSE.

U.S. Department of Justice

United States Attorney
District of Massachusetts

Main Reception: (617) 748-3100
Dickens Mathieu Direct Line: (617) 748-3227

United States Courthouse, Suite 9200
1 Courthouse Way
Boston, Massachusetts 02210

July 25, 2002

James E. McCall, Esquire
4 Longfellow Place
Boston, MA 02114

Re: United States v. Santiagofiol, et al.
Criminal No. 01-10333-MEL

Dear Counsel:

This letter sets forth the Agreement between the United States Attorney for the District of Massachusetts ("the U.S. Attorney") and your client, Narciso Franco ("Defendant"), in the above-captioned case. The Agreement is as follows:

1. Change of Plea

At the earliest practicable date, Defendant shall plead guilty to Counts One and Two of the Indictment. Defendant expressly and unequivocally admits that he in fact committed the crimes charged in these Counts of the Indictment, and is in fact guilty of those offenses.

2. Penalties

Defendant faces the following penalties:

A minimum mandatory term of imprisonment of five years; a maximum term of imprisonment of 40 years; A fine of up to \$2,000,000; at least three years of supervised release; and a \$100 mandatory special assessment for each count of conviction.

Defendant may also be deportable and/or excludable by the United States Immigration and Naturalization Service as a consequence of his conviction of the offenses to which he is pleading guilty.

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3. Sentencing Guidelines

The parties will take the following positions at sentencing under the United States Sentencing Guidelines:

- (a) Counts One and Two of the Indictment involved a total of 500-2000 grams or more of cocaine.
- (b) Defendant should be assessed a two-point upward adjustment in his offense level pursuant to §3C1.1 as a result of his intentional failure to appear in court for a scheduled Rule 11 hearing.
- (c) Defendant will take the position that notwithstanding his failure to appear, the Court should nonetheless reduce by three levels Defendant's Adjusted Offense Level under U.S.S.G. § 3E1.1. The U.S. Attorney will recommend that Defendant not receive a reduction in Offense Level for acceptance of responsibility.

4. Sentence Recommendation

- (a) The U.S. Attorney agrees to recommend a sentence within the applicable guideline range, as determined at sentencing, but not lower than any applicable minimum mandatory term of imprisonment.
- (b) The U.S. Attorney and Defendant will not move for a departure unless they give written notice to the other party of the basis for such departure not less than fourteen days before sentencing. Any basis for departure for which written notice is not received at least fourteen days before sentencing is hereby expressly waived and cannot be argued at the time of sentencing.
- (c) In the event of an appeal from, or collateral challenge to, Defendant's sentence, the U.S. Attorney reserves his right to argue the correctness of Defendant's sentence and the manner in which the District Court determines it.

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5. Payment of Mandatory Special Assessment

Defendant agrees to pay the mandatory special assessment to the Clerk of the Court on or before the date of sentencing, unless Defendant establishes to the satisfaction of the Court that Defendant is financially unable to do so.

6. Court Not Bound By Agreement

The sentencing recommendations made by the parties and their respective calculations under the Sentencing Guidelines are not binding upon the U.S. Probation Office or the sentencing judge. Within the maximum sentence which Defendant faces under the applicable law, the sentence to be imposed is within the sole discretion of the sentencing judge. Defendant's plea will be tendered pursuant to Fed. R. Crim. P. 11(e)(1)(B). Defendant may not withdraw his plea of guilty regardless of what sentence is imposed. Nor may Defendant withdraw his plea because the U.S. Probation Office or the sentencing judge declines to follow the Sentencing Guidelines calculations or recommendations of the parties. In the event that the sentencing judge declines to follow the Sentencing Guidelines calculations or recommendations of the U.S. Attorney, the U.S. Attorney reserves the right to defend the sentencing judge's calculations and sentence in any subsequent appeal or collateral challenge.

7. Rejection of Plea By Court

Should Defendant's guilty plea not be accepted by the Court for whatever reason, or later be withdrawn on motion of Defendant, this Agreement shall be null and void at the option of the U.S. Attorney.

8. Breach of Agreement

If the U.S. Attorney determines that Defendant has failed to comply with any provision of this Agreement, has violated any condition of his pretrial release, or has committed any crime following his execution of this Agreement, the U.S. Attorney may, at his sole option, be released from his commitments under this Agreement in their entirety by notifying Defendant, through counsel or otherwise, in writing. The U.S. Attorney may also pursue all remedies available to him under the law, irrespective of whether he elects to be released from his commitments under this Agreement. Further, the U.S. Attorney may pursue any and all charges which have been, or are to be, dismissed pursuant to

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this Agreement. Defendant recognizes that no such breach by his of an obligation under this Agreement shall give rise to grounds for withdrawal of his guilty plea. Defendant understands that, should he breach any provision of this agreement, the U.S. Attorney will have the right to use against Defendant before any grand jury, at any trial or hearing, or for sentencing purposes, any statements which may be made by her, and any information, materials, documents or objects which may be provided by his to the government subsequent to this Agreement, or pursuant to the proffer agreement previously entered in this case, without any limitation. In this regard, Defendant hereby waives any defense to any charges which he might otherwise have under any statute of limitations or the Speedy Trial Act.

9. Who Is Bound By Agreement

This Agreement is limited to the U.S. Attorney for the District of Massachusetts, and cannot and does not bind the Attorney General of the United States or any other federal, state or local prosecutive authorities.

10. Complete Agreement

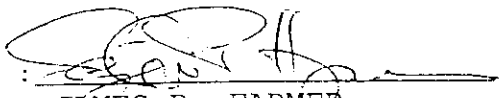
This letter contains the complete and only agreement between the parties relating to the disposition of this case. No promises, representations or agreements have been made other than those set forth in this letter. This Agreement supersedes prior understandings, if any, of the parties, whether written or oral. This Agreement can be modified or supplemented only in a written memorandum signed by the parties or on the record in court.

If this letter accurately reflects the Agreement between the U.S. Attorney and Defendant, please have Defendant sign the Acknowledgment of Agreement below. Please also sign below as Witness. Return the original of this letter to Assistant U.S. Attorney Dickens Mathieu.

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Very truly yours,

MICHAEL J. SULLIVAN
United States Attorney

By : 
JAMES B. FARMER
Assistant U.S. Attorney
Chief, Criminal Division

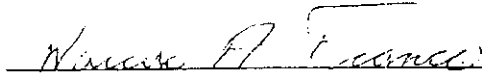
STEPHEN P. HEYMANN
Assistant U.S. Attorney
Deputy Chief,
Criminal Division

DICKENS MATHIEU
Assistant U.S. Attorney

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ACKNOWLEDGMENT OF PLEA AGREEMENT


I have had this letter read to me in my native language in its entirety and discussed it with my attorney. I hereby acknowledge that it fully sets forth my agreement with the United States Attorney's Office for the District of Massachusetts. I further state that no additional promises or representations have been made to me by any official of the United States in connection with this matter. I understand the crimes to which I have agreed to plead guilty, the maximum penalty for those offenses and Sentencing Guideline penalties potentially applicable to them. I am satisfied with the legal representation provided to me by my attorney. We have had sufficient time to meet and discuss my case. We have discussed the charges against me, possible defenses I might have, the terms of this Plea Agreement and whether I should go to trial. I am entering into this Agreement freely, voluntarily, and knowingly because I am guilty of the offense to which I am pleading guilty and I believe this Agreement is in my best interest.



Narciso Franco
Defendant

Date: 7/25/02

I certify that Narciso Franco has read this Agreement, or had this Agreement read to him in his native language, and that we have discussed its meaning. I believe he understands the Agreement and is entering into the Agreement freely, voluntarily and knowingly.



James E. McCall, Esq.
Attorney for Defendant

Date: 7/25/02

EXHIBIT 3

Offense Level Computation

(20) The Guideline Sentencing Range has been calculated using the guidelines in effect at the time of sentencing, that is, the guidelines contained in the Guideline Manual issued on November 1, 2001. The guidelines that effect the offense level and/or the criminal history calculations have not changed since the instant offense was committed.

(21) Violations of 21 U.S.C. §846 and 21 U.S.C. §841(a)(1) are found at U.S.S.G. §2D1.1. Per U.S.S.G. §3D1.2, all counts are grouped together.

(22) **Base Offense Level:** The defendant is accountable for the thirteen (13) ounces of cocaine seized on July 12, 2001, as well as for the nine (9) ounces of cocaine that he and his coconspirator had sold to a confidential informant earlier that same day. 22 ounces of cocaine converts to 623.7 grams of cocaine. The defendant has also pled guilty to being accountable for between 500 grams and 2,000 grams of cocaine. The defendant is, therefore, accountable for at least 500, but less than 2 kilograms of cocaine. Pursuant to U.S.S.G. §2D1.1(c)(7), the base offense level is 26.

26

(23) Specific Offense Characteristics: None	0
(24) Adjustment for Role in the Offense: None	0
(25) Victim Related Adjustment: None	0

(26) **Adjustment for Obstruction of Justice:** As the defendant wilfully failed to appear, as ordered, for a judicial proceeding, pursuant to U.S.S.G. §3C1.1, App. Note (e), the offense level is increased by two (2) levels as the defendant wilfully obstructed justice.

+2

(27) Adjusted Offense Level (subtotal):	28
(28) Adjustment for Acceptance of Responsibility: None.	0
(29) <u>Total Offense Level:</u>	28

U.S.S.G. §5C1.2 (Safety Valve)

(30) The Probation Office has determined that the defendant meets criteria 1-4 of U.S.S.G. §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences). If a determination is made that criterion 5 is satisfied, then a two (2) level reduction is warranted, per U.S.S.G. §2D1.1(b)(6), resulting in a Total Adjusted Offense Level of 26. The Court would also have the authority to impose a sentence below that which is statutorily mandated.

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

(31) None.

Criminal Convictions

(32) None.

Criminal History Computation

(33) As the defendant has no convictions, there are zero criminal history points.

(34) According to the sentencing table (U.S.S.G. Chapter 5, Part A), zero (0) to one (1) criminal history points establish a criminal history category of I.

TOTAL POINTS 0

CATEGORY I

Other Criminal Conduct

(35) None known.

Pending Charges

(36) None known.

EXHIBIT 4

in Worcester, Massachusetts. On that date, **Narciso Franco** appeared in U.S. District Court, at Boston, before Magistrate Judge Collings. A detention hearing was held and the court ordered the defendant detained.

(M) On July 25, 2002, **Narciso Franco** appeared with counsel in U.S. District Court, at Boston, before the Honorable Morris E. Lasker and entered a plea of guilty to the two-count Indictment. After the government provided a factual basis for the plea, the court accepted the plea and scheduled sentencing for October 15, 2002.

Codefendants

(N) Javier Santiago-Fiol: Docket #01-10333-MEL-01: Sentenced on 7/25/02 to one year and one day imprisonment, 4 years of supervised release. The case is pending appeal in the U.S. Appeals Court for the First Circuit.

Related Cases

(O) Curtis Strickland: Docket #01-10351-JLT: Pending
Omay Ford: Docket #01-10351-JLT: Pled guilty to Conspiracy to Possess with Intent to Distribute and Distribution of Cocaine Base, and to Distribution of Cocaine Base; Aiding and Abetting. Sentenced on April 24, 2002 to 120 months custody, 5 years supervised release, and \$200 special assessment.

Plea Agreement

(P) The plea agreement is attached to this report.

Offense Conduct

(1) The following statement of the offense was submitted by Assistant United States Attorney, Dickens Mathieu:

(2) Javier Santiago-Fiol and **Narciso Franco** were arrested on July 12, 2001, as a result of the cooperation of a Confidential Informant ("CI"). Approximately one hour before Santiago-Fiol and **Franco** were arrested, the CI had been arrested for distribution of crack cocaine after the CI was observed engaging in a hand-to-hand crack transaction with the target of a Drug Enforcement

EXHIBIT 5

1 THE COURT: You will be 36 maybe when you
2 come out. Your children will still be pretty young, and
3 I hope that you can rebuild your life.

4 MR. McCALL: Your Honor, could I --

5 THE COURT: Oh. Yes. The defendant should
6 know, you have a right to appeal from my sentence to the
7 extent that you believe that I've done anything
8 improperly or illegally.

9 MR. MATHIEU: Your Honor, I just want to make
10 a couple of clarifications for the record because it's
11 possible that the defendant could later file a motion
12 pursuant to 18 U.S.C. 2255. And I just want to clarify
13 the calculations here and also just make sure that --
14 the Court had earlier mentioned that the defendant is
15 being sentenced at this time for importation of heroin.
16 And I just wanted to clarify the Court's understanding
17 that it is, in fact, distribution of heroin and
18 conspiracy to distribute it as opposed to import heroin.

19 THE COURT: He pleaded guilty to both.

20 MR. MATHIEU: Yes, Your Honor. I just wanted
21 to clarify the precise conviction that he's been
22 sentenced on. And then also I just wanted to confirm
23 that the sentence is based on the defendant not
24 receiving any reduction for acceptance of responsibility
25 and that the Court did also not enhance him for role and

1 that also there was no reduction for the safety valve.

2 THE COURT: That's correct.

3 MR. MATHIEU: Thank you, Your Honor.

4 MR. McCALL: So essentially, again, just by
5 way of clarification, the Court is finding he does not
6 qualify for the safety valve?

7 THE COURT: Yes.

8 MR. McCALL: And I assume that's a category
9 five -- I mean, criteria five in the proffer?

10 THE COURT: Yes. Yes.

11 MR. McCALL: I understand. Thank you, Your
12 Honor.

13 THE CLERK: All rise. Court is now in
14 recess.)

15 (Whereupon the proceedings adjourned.)
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EXHIBIT 6

1 partner. He did not join a partnership.

2 According to Pena, he was an employee. And
3 he sold ounce amounts of cocaine, not only to Ford, but
4 also to other customers of this individual. Pena's
5 report talks about selling ounce amounts to someone
6 named in East Boston, to another person at the Franklin
7 Hill projects in Dorchester all at the behest of this
8 defendant, who was his boss.

9 And I guess that leads me to the third, which
10 is role. And based on his role in the offense, Your
11 Honor, the defendant should be assessed a three-point
12 upward adjustment.

13 And starting at a base offense level of 26,
14 the government would suggest that the defendant should
15 then be assessed a three-level adjustment, which would
16 take him to a Level 29. No assessment should be
17 granted, and he certainly should not receive the benefit
18 of the safety valve. And based on that, the defendant
19 is looking at 87 to 108 months. And the government
20 would recommend 95 months.

21 THE COURT: Thank you.

22 Mr. Franco, sir, this is all about you. And
23 I'd like to hear what you have to say. Although my hand
24 is not free, it certainly is important to me to know
25 what the defendant wants to say before I impose

1 firearm or other dangerous weapon and if ordered
2 deported, the defendant is to leave the United States
3 and not to return without prior permission of the United
4 States Attorney General.

5 It is further ordered that the defendant pay
6 the United States a special assessment of \$100 to be
7 payable immediately.

8 Now, Mr. Franco, while I didn't agree
9 altogether with your attorney, I have put you at the
10 lower level of the category that applies. You will be
11 given credit for what you've done already. You will be
12 given days off for good behavior.

13 I want to take this occasion to express my
14 personal disagreement with the results of what the
15 Guidelines compel me to adopt on this occasion. I
16 believe that Mr. Franco has learned his lesson; and I do
17 not agree with what the Guidelines suggest, which is the
18 result here of a sentence of more or less three years.
19 But it is not within my power to change that.

20 I'm telling the family, too, from what I've
21 read about your brother and your husband, he does not
22 seem to me to be a bad man. But he made a very bad
23 mistake -- two bad mistakes. For God's sake, don't do
24 it again.

25 THE DEFENDANT: Thank you.

EXHIBIT 7

1 To give this defendant an acceptance of
2 responsibility would make a mockery of that provision.
3 Sure, he did notify the government that he was going to
4 plead guilty. But then on the date that he was supposed
5 to plead guilty, he took off. His excuse was that, My
6 girlfriend made me do it. And that's just not
7 acceptable.

8 In the process, he not only caused the Court
9 and the U.S. Marshals to expend significant resources,
10 but he caused his own brother to forfeit \$100,000 that
11 was tendered as bail. There's no way that could be
12 construed as acceptance of responsibility.

13 THE COURT: Well, no, but I don't think he
14 should be penalized further.

15 MR. MATHIEU: Well, the acceptance of
16 responsibility element is not a penalty. It's actually
17 a benefit to defendants who do actually show actual
18 remorse.

19 THE COURT: True.

20 MR. MATHIEU: Now, with respect to the safety
21 valve, Your Honor, the section that applies requires
22 that no later than the time of sentencing, the defendant
23 truthfully provide to the government all information
24 concerning the offense or offenses that he is a part of.
25 And as we set forth in our sentencing memorandum, the

1 defendant was not truthful.

2 And it's not just my feeling or the feeling
3 of the police agent who sat in on that proffer that he
4 was not truthful. The proffer was not truthful based on
5 the other evidence that was obtained during the course
6 of the investigation. And what the two defendants
7 before this Court are attempting to do, apparently, is
8 to point the finger at each other and say, Well, it was
9 his fault. No, it was his fault. And then they
10 cancelled each other out and they both get the benefit.

11 And there's no factual basis for this
12 defendant to get that benefit because the facts
13 corroborate what Martin Pena said and not what the
14 defendant said with respect to the defendant's
15 supervisory role, with respect to the defendant's
16 managerial role, with respect to the fact that it was
17 the defendant who paid Pena and the other co-defendant
18 who was not -- or who was not the co-defendant, the
19 other co-conspirator, Junior.

20 And the fact that it was Pena who made the
21 initial contact I think is immaterial. The fact that a
22 worker seeks additional clients for his boss so that he
23 can get an additional commission does not make him less
24 of a worker; it might make him a better worker. But it
25 doesn't mean that all of a sudden he's elevated to a